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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES A. GAMMON,
Superintendent,
Moberly Correctional Center, and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioners,

vs.

JON KEITH SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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2cpp

Question Presented for Review

I.

Does the nonretroactivity principle of *Teague v. Lane* bar the application in a habeas corpus case of a rule that a prosecutor violates a defendant's due process rights when the prosecutor argues a contradictory factual theory of the crime at the later separate trial of a codefendant because this is a new rule of law, and not a new watershed rule of criminal procedure implicit in the concept of ordered liberty without which the accuracy of criminal proceedings would be diminished?

Parties to the Proceeding

All the parties to the proceeding have been listed in the caption. James A. Gammon, the Superintendent of the Moberly Correctional Center is Jon Keith Smith's current custodian. Therefore he is the proper party in a habeas corpus action involving a state criminal sentence that is currently being served. 28 U.S.C. §2254, Rule 2(a). Jeremiah W. (Jay) Nixon is the Attorney General of Missouri and is therefore the proper party in a habeas action involving the future service of a consecutive state criminal sentence. 28 U.S.C. §2254, Rule 2(b).

Michael Groose, who along with Attorney General Nixon, was an appellee in the case below, is no longer a party, because he is no longer the custodian of Jon Keith Smith and should be replaced in the caption of the case by James A. Gammon, who is now acting in the role of custodian of Jon Keith Smith.

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On Petition for Writ of Certiorari to the
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Petitioners, the Superintendent of the Moberly Correctional Center, James A. Gammon, and the Attorney General of Missouri, Jeremiah W. (Jay) Nixon, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court below in Case No. 97-2694 granting a writ of habeas corpus is published as *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). The case was decided on March 7, 2000 and rehearing was denied on June 1, 2000 (Appendix, "App" at 1).

The unpublished order of the United States Court of Appeals for the Eighth Circuit granting a certificate of appealability on November 16, 1998 in *Smith v. Groose*, is reproduced at App. 21.

The unpublished order of the United States District Court for the Western District of Missouri in *Smith v. Groose*, No. 91-0561-CV-W-8-P denying the motion for relief from judgment and the amended motion for relief from judgment on November 26, 1996 is reproduced at App. 24.

The unpublished order of the United States District for the Western District of Missouri in *Smith v. Groose*, No. 91-0561-CV-W-8-P denying the petition for habeas corpus relief on August 4, 1995 following remand from the Eighth Circuit is reproduced at App. 29.

The unpublished January 29, 1993 judgment of the United States Court of Appeals for the Eighth Circuit in *Smith v. Groose*, No. 92-3815 granting rehearing vacating its earlier judgment and remanding the case to the district court for further proceedings is reproduced at App. 32.

The unpublished August 29, 1992 opinion of the United States District Court for the Western District of Missouri denying the petition for habeas corpus in *Smith v. Groose*, No. 91-0561-CV-W-8-P is reproduced at App. 38.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on March 7, 2000 (App. at 2). The petition for rehearing with suggestions for rehearing en banc was denied on June 1, 2000 (App. at 1). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTION PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Specific Facts of the Case

On the night of November 26-27, 1983, Paul and Erline Chambers, an elderly couple were murdered in a home invasion burglary/robbery. The crime involved six total participants: Jon Keith Smith, as well as individuals named Lytle, Bowman, Dixon, Cunningham and Cayson. On December 2, 1983 Lytle gave a statement in which he admitted that all six individuals were participating in the burglary/robbery at the time of the killings and that he witnessed Bowman stab one of the victims. According to this

statement there were initially two groups of burglars who arrived independently at the house but one member of each group was familiar with one member of the other, and they began to work together before the killings.

Lytle testified in the state's case in chief at Jon Keith Smith's March 1987 trial. Lytle, however, testified to a version of events that tended to exculpate himself, Smith, Bowman and Dixon of the murders, blaming these on Cunningham and Cayson. Lytle testified that there were two separate groups of burglars and that Cunningham and Cayson had already committed the murders before the second group arrived independently on the scene, intending to rob the first group, but ultimately agreeing to work together with them.

The trial prosecutor then impeached his own witness, Lytle, with Lytle's December 2, 1983 statement and used this impeachment with the prior inconsistent statement as substantive evidence of Smith's guilt, as was permitted by Missouri evidentiary law. In closing argument the prosecutor emphasized that Lytle's trial testimony should not be believed. He argued that it was implausible that two groups of burglars who happened to know each other would coincidentally target the same house at the same time. He also argued that Lytle's testimony that he and his group searched out and marked unoccupied houses to burglarize was inconsistent with his testimony that the group saw a second group of burglars and intended to rob them. He further argued that it was implausible that a member of the alleged first group of burglars would answer the door when the second group of burglars rang and ask "Can I help you?" when there were already two dead bodies in the house. The prosecutor also argued that Bowman killed the victims to avoid detection. In short at the Smith trial in March 1987, the prosecutor's theory of the case was that Lytle's trial testimony was implausible and all six individuals were

working together at the time of the murders and probably had been doing so throughout the burglary. This theory is consistent with what the prosecutor testified his personal beliefs of what happened were, in a deposition given in connection with the case of another codefendant, Dixon, that is part of the record in this case.

The same prosecutor tried codefendant Cunningham in October 1987. At this trial the prosecutor again called Lytle in his case in chief. Lytle testified essentially as he had at the Smith trial, but the prosecutor did not impeach him with the December 2, 1983 statement. Impeachment was unnecessary to convict Cunningham of murder because the trial testimony and the earlier statement both inculpated Cunningham for felony murder. Cunningham's defense, however, impeached Lytle with the December 2, 1983 statement and argued a theory that there were only five total burglars and that Lytle and the other four had made up Cunningham's participation. The defense also called a police detective who testified that the December 2, 1983 statement by Lytle was not coerced.

The prosecutor objected in Cunningham's trial to defense questions that had as their premise that there were only five burglars and that these five had gotten together and agreed to blame Cunningham who was not involved. He argued that Cunningham was guilty of murder whether or not he actually stabbed the victims. However he also argued that the evidence showed that Cunningham was "the one doing the stabbing" and later argued the following. "He has -- these people are stabbed. This is before Anthony Lytle comes into the picture . . . . Then he talked later about four or five jumping over the fence the next day see, because he knows that after they did this the four or five guys joined the burglary."

In short in Cunningham's trial in which either version of Lytle's story was sufficient to convict and defense counsel argued that Lytle had made up Cunningham's participation, the prosecutor's theory of the case appears to have been consistent with Lytle's testimony and inconsistent with what he argued at the Smith trial. In both cases, Lytle's testimony was essentially identical, and in both cases he was impeached with his December 2, 1983 statement albeit by different parties.

The Eighth Circuit Court of Appeals found a due process violation occurred in Smith's case because of the use of an inconsistent and contradictory theory at the subsequent trial of Cunningham, ordered Smith's murder, armed criminal and robbery convictions overturned and ordered that Lytle's December 2, 1983 statement not be admitted in any retrial of Smith.[1]

Legal Principles Involved

This is a habeas corpus case arising from an application for a writ of habeas corpus from a prisoner in state custody. The district court had jurisdiction to decide the case under 28

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[1]Smith, Bowman, Dixon, Lytle and Cunningham were ultimately convicted of one or more murder charges arising from the crime of November 26-27, 1983. Cayson was never tried, according to the transcript of Lytle's state post-conviction review hearing, because he had already been sentenced to life in prison for an unrelated crime. Lytle succeeded in having all his convictions except one burglary count overturned in a state post-conviction review proceeding. Bowman raised essentially the same theory on which the court below granted relief to Smith unsuccessfully in a habeas corpus petition. *Bowman v. Armontrout*, 859 F.Supp. 369, 380 (W.D. Mo. 1994). The denial of this petition was affirmed by the court below. Bowman did not pursue this issue on appeal. See *Bowman v. Gammon*, 85 F.3d 1339 (8th Cir. 1996).

U.S.C. §2254, and the court below had jurisdiction to review the case under 28 U.S.C. §2253.

The issue in this case is whether it is a rule of law and retroactively applicable to cases on habeas corpus review that the due process clause bars a prosecutor from arguing factually contradictory theories of a crime at the separate trials of codefendants. The court below provided two answers to this question each of which merit review by this Court. The court below held that this rule is not new and therefore is retroactively applicable to cases on habeas corpus review. The court below also held that even if this rule is "new" it is the type of watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings that may be created and retroactively applied in a habeas corpus action. The court below's rulings on both these points are in direct conflict with the rulings of the United States Court of Appeals for the Fifth Circuit, and conflict with the principles this Court set out in *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny.[2]

In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), this Court clarified and unified existing precedent on when a new rule of law should be applied to a case on

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[2]The specific ground on which the court below granted relief was not raised in the Missouri courts or a United States district court, making the ground on which relief was granted procedurally barred and an abuse of the writ of habeas corpus. These defenses were raised in the court below. Petitioner now explicitly waives the defenses of procedural bar, abuse of the writ and statute of limitations, in order not to interfere with this Court's review of the question presented for review. See *Goeke v. Branch*, 514 U.S. 115 (1995) (court below grants habeas relief on claim raised for the first time at appellate oral argument and this Court conducts *Teague* review on writ of certiorari).

collateral review and defined what constitutes a new rule of law. This Court stated that "a case announces a new rule of law if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 302 (emphasis in original). This Court then stated that a new rule could be applied to case on collateral review only if it placed primary private individual conduct beyond the reach of the criminal law, or if the new rule was a watershed rule of criminal procedure without which the likelihood of an accurate conviction is seriously diminished. *Id.* at 311-314. This Court opined that "Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Id.* at 313.

In *Butler v. McKellar*, 494 U.S. 407 (1990), a majority of this Court further clarified the principles set forth in *Teague v. Lane*. In *Butler*, this Court held that a rule is "new" even if the decision that creates it is controlled by or within the logical compass of earlier precedents if the result reached was susceptible to debate among reasonable jurists. *Id.* at 416. This Court held that a watershed new rule which may be retroactively to a case on collateral review must be implicit in the concept of ordered liberty and its violation must have seriously diminished the likelihood of an accurate determination in the case. *Id.* at 417.

In *Sawyer v. Smith*, 497 U.S. 227, 235-237 (1990), this Court found that an Eighth Amendment prohibition on prosecutorial comment that misleads a jury about its sentencing responsibility was a new rule of law at the time it was announced. This Court pointed out that if the general principle that capital sentencing should be reliable was held to dictate this rule the test for new rules would be meaningless. *Id.* at 237 (stating "the test would be

meaningless at this level of generality"). Similarly in *Gilmore v. Taylor*, 508 U.S. 334, 344-345 (1993), this Court rejected the proposition that cases establishing a right to present a defense dictated the rule that the state could not give jury instructions that would likely prevent the jury from considering an affirmative defense.[3] These cases hold that general principles about fairness and reliability do not dictate specific rules. In sum, a rule does not cease to be new merely because the court that proclaims it perceives the rule to enhance the fairness of trials or the reliability of sentencing proceedings.

The court below did not cite any holding of this Court or any majority holding of any court that dictates the rule that a prosecutor violates the due process clause by presenting contradictory factual theories of the case at the separate trials of codefendants. The court below relied for direct support for this rule on a single judge concurrence in *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (en banc) (Clark J., specially concurring) and a vacated Ninth Circuit plurality opinion that was issued years after Smith's conviction became final through the completion of direct review, in *Thompson v. Calderone*, 120 F.3d 1045, 1058-1059 (9th Cir. 1997) (en banc) *vacated on other grounds*, 523 U.S. 538 (1998). The Court below nevertheless found that the rule it announced was not new.

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[3]In *Penry v. Lynbaugh*, 492 U.S. 302 (1989), this Court found that a rule, that penalty phase jury instructions preventing jurors from considering mitigating evidence are unconstitutional, was not new. This Court noted that existing precedents of this Court already held that jurors must be allowed to consider mitigating circumstances in the sentencing decision. *Penry* did not involve the kind of general to specific deductive reasoning criticized in *Sawyer* and *Gilmore*.

The Court below defined "a new rule of law" as "one that is not dictated by precedent and if adopted would contravene well established precedents" (App. at 18) (emphasis added). The second prong of this test is absent from this Court's precedents defining a new rule. The court below's unique understanding of what constitutes a new rule and what it takes for a new rule to be dictated by existing precedent has led to a conflict with the decisions of the Fifth Circuit Court of Appeals that have held that a rule, similar to the one the court below has adopted, is a new rule, that may not retroactively be applied in a habeas corpus case. See *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

In the event that the rule it has set out in its opinion is a "new rule", the Court below has determined that it is one of the rare watershed rules of criminal procedure implicit in the concept of ordered liberty without which the accuracy of trials would be diminished, and therefore applicable in a habeas corpus case (App. at 19). This would be the first new rule of its type discovered since this Court defined watershed rules of criminal procedure in 1989 in *Teague v. Lane*.

This holding also places the decision of the court below in conflict with the Fifth Circuit Court of Appeals which has rejected the conclusion that a similar rule would be a watershed rule of criminal procedure that may be retroactively applied in a habeas corpus case. See *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

This holding by the court below is extremely important because it creates a new rule of law that would affect numerous criminal cases involving multiple defendants. The decision narrowly defines what a new rule of law is, in a way that conflicts with this Court's *Teague* jurisprudence, and

threatens to spawn future conflicts between the circuit courts of appeals. The decision also purports to create the first post-*Teague* watershed rule of criminal procedure. Finally, the decision conflicts with Fifth Circuit precedents, analyzing a similar proposed rule.

Summary of Reasons for Granting The Writ

The decision of the court below directly conflicts with the precedent of the Fifth Circuit on the issue of whether a particular rule of law is new. The decision also conflicts with the precedent of the Fifth Circuit on whether this rule is a watershed rule of criminal procedure that is exempt from the ban on the application of new rules in cases on collateral review. Because of this conflict and the broad applicability of the rule enforced, certiorari review is indicated. Additionally the decision of the court below narrowly interprets the concept of a "new rule" and broadly interprets the concept of a "watershed rule" in a way that is inconsistent with this Court's precedents and threatens to create unnecessary conflicts between the circuit courts of appeals in the future. This also indicates that review on certiorari should be granted in this case.

Reason for Granting the Writ

1. **The decision of the Court below conflicts with the decisions of the United States Court of Appeals for the Fifth Circuit on an important issue with broad application to criminal cases throughout the country.**

The court below held that the due process clause requires that a criminal conviction be reversed because at the subsequent trial of a codefendant the prosecutor argued a theory of the facts of the crime that was inconsistent with and

on important points contradicted the theory he argued at the earlier trial. The court below found that this decision did not create a new rule of law and therefore the rule could be applied in a habeas corpus case. The court below also held that even if its decision did create a new rule of law, the rule could be applied in a habeas corpus case because it is the type of watershed rule of criminal procedure that may be retroactively applied to cases on collateral review.

The United States Court of Appeals for the Fifth Circuit has reached opposite conclusions on these points. *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994) is irreconcilable with the opinion of the Court below. *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995) also cannot be reconciled with the decision of the court below.

In a fact pattern similar to the fact pattern in the case below, Jesse Jacobs made a pretrial videotaped statement to the police admitting to being the triggerman in an abduction and murder committed with an accomplice, Hogan. *Jacobs v. Scott*, 31 F.3d 1319, 1321 (5th Cir. 1993). However, testifying at his own trial Jacobs blamed the killing on Hogan and claimed he was not in the house where the killing occurred when the killing happened. *Id.* at 1321-1322. The prosecutor impeached him with his earlier videotaped statement, argued that Jacobs and Jacobs alone was the killer and presented to the jury as a "special issue" for imposing the death penalty that Jacobs caused the death of the victim and the crime was committed deliberately with the reasonable expectation that her death would result. *Id.* at 1332. The jury found this and another "special issue" and sentenced Jacobs to death. *Id.*

Several months later, at the trial of Hogan, Jacobs also testified that Hogan had done the actual killing. In Hogan's case, the same prosecutor argued that Jacobs had not done the

actual killing, that Jacobs did not know Hogan had a gun and that Jacobs did not in any way anticipate the victim would be shot. *Id.* at 1322-1323. Under Texas law Jacobs was only eligible for the death penalty if he intentionally caused or anticipated the death of the victim. *Id.* at 1324.

Despite the prosecutor's theory of the case at the Hogan trial, the state continued to insist in its subsequent appellate brief in Jacobs' case that Jacobs had been the triggerman and was eligible for the death penalty. *Id.* at 1326. Jacobs filed a habeas corpus petition alleging Eighth and Fourteenth Amendment violations arose from the state's presentation of contradictory theories of the crime in the Jacobs and Hogan cases. *Id.* at 1326. The Fifth Circuit agreed that the theories presented were contradictory but held that to find this violated the constitution would require a new rule of law not dictated by existing precedent which could not be applied in a habeas corpus case. *Id.* at 1326 *citing Teague v. Lane*, 489 U.S. 288, 307 (1989). This decision is in direct conflict with the holding of the Court below.

Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) is also in conflict with the decision below. The United States District Court for the Southern District of Texas granted a writ of habeas to Nichols, based on a theory of estoppel found to be required by the due process clause, because the state in separate proceedings had presented the contradictory theories that both Nichols and his codefendant, Williams, had fired the one single fatal shot into a murder victim, and had obtained death sentences against both. *Id.* at 1264-1265.[4] The Fifth

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[4]Williams was sentenced to death on the theory that he was the person who shot the victim. The penalty phase jury was not instructed on "law of the parties", the Texas concept of accomplice liability. *Nichols v. Scott*, 659 F.3d 1255, 1261 (5th Cir. 1995). At Nichols' first trial the jury at the punishment phase was also not

Circuit relying on *Jacobs v. Scott* held that this was a new rule of law not dictated by precedent that could not be applied in a habeas case. *Id.* 1268-1274. The Fifth Circuit Court of Appeals explicitly held the following:

> In the present circumstances, to hold that the state was constitutionally barred by any form of estoppel--whether under the rubric of collateral estoppel or some variety of judicial or other estoppel --from taking the position in Nichols' case that the shot he fired was the fatal shot because it had previously taken the position in Williams' case, in which Williams received the death sentence, that the fatal shot was the one fired by Williams, would be to apply "a new rule" of constitutional law, "not *dictated* by precedent existing at the time" Nichols' "conviction became final" -- January 9, 1989--contrary to *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1989) (original emphasis).

(*Id.* at 1273).

The United States Court of Appeals for the Fifth Circuit also found that the rule Nichols sought was not a watershed rule of criminal procedure that could be retroactively applied in a habeas corpus case because what the prosecutor argued

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instructed on law of the parties and the jury was unable to reach a verdict. *Id.* at 1202. Post-trial jury interviews revealed that "whether or not Nichols was the triggerman had caused problems for the jury in considering the death penalty." *Id.* At a retrial of Nichols, the state "primarily" argued that Nichols was the shooter but argued that even if he was not he should have anticipated the killing and was eligible for the death penalty under the law of the parties. *Id.*

in Williams' case "has nothing to do with the likely accuracy of any determinations made in the subsequent Nichols case." *Id.* at 1273. The Fifth Circuit noted that the *Teague* definition of a new rule could not be overcome merely by invoking longstanding judicial pronouncements that due process concerns itself with fundamental fairness and similar concepts. *Id.* at 1274, *quoting Sawyer v. Smith*, 497 U.S. 227, 237 (1990) (*Teague* "test would be meaningless if applied at this level of generality").

The conflict between the opinion of the court below and the decisions of the Fifth Circuit is real. It implicates an issue that has relevance to every prosecutor in America who may separately try criminal defendants, who have acted jointly in the commission of a crime. Such a prosecutor may be faced with multiple defendants each of whom has given various contradictory accounts of the facts of the crime. The decision of the court below sets out a new constitutional rule on how the prosecutor must argue the theory of what happened in these separate trials. This is an important case with broad application on which certiorari should be granted.

2. **The opinion of the Court below explicitly misinterprets and misapplies this Court's *Teague v. Lane* jurisprudence concerning the definition of a new rule of law. This has the potential of becoming an engine that will generate multiple unnecessary conflicts between the circuit courts of appeals, just as in this case it generated a conflict with the Fifth Circuit.**

In rejecting the idea that the rule it proclaimed in this case was a new rule of law, the court below articulated a two-pronged test: "Under *Teague* a new rule is one that is not dictated by precedent and, if adopted, would contravene well-established precedents" App. at 16. The second prong of this

test is contrary to the decisions of this Court.[5] In *Butler v. McKellar*, 494 U.S. 407, 410-411 (1990), this Court affirmed the holding of *Teague* that a rule is new if it is not dictated by existing precedent. This Court noted that the new rule principle vindicates good faith interpretations of existing precedent by state courts and analyzed whether the outcome sought was susceptible to debate among reasonable jurists to determine whether the creation of new rule was required to grant relief.

Neither *Butler v. McKellar* nor *Saffle v. Parks* nor any other precedent of this Court endorses the two-pronged test adopted by the Court below. The two-pronged test in fact contradicts *Butler v. McKellar* by narrowing the definition of a new rule to exclude a category of rules not dictated by existing precedent. This test is a formula for the creation of error and repeated conflicts with the other circuit courts of appeals that hold to this Court's reasoning and the test set out in *Butler v. McKellar*.

The Court below also was unable to cite to any majority holding of any court that promulgated or enforced a rule identical to or even similar to the rule created and enforced in this case. Nevertheless the court below found that the rule it enforced was dictated by existing precedent. The court below relied largely on the general principles that trials should be fair and prosecutors should be interested in justice rather than convictions, and reasoned that these general principles dictated that presenting contradictory theories of a crime at separate trials necessarily violates the due process

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[5]The opinion below cites to the syllabus of this Court's decision in *Saffle v. Parks* as support for this two pronged test App. at 16, *citing* 494 U.S. 484, 486 (1990). This syllabus is neither part of the opinion, nor can it be fairly read to support the proposition for which the court below cited it.

clause (App. at 8-9, 17).

This type of reasoning was rejected by this Court in *Sawyer v. Smith*, 497 U.S. 227, 237 (1999). In *Sawyer v. Smith*, this Court found that the principle that capital sentencing should be reliable did not dictate the specific rule that a prosecutor may not constitutionally mislead the jury about its responsibility for sentencing. *Id.* This Court found that applying the test for a new rule at this level of generality would make the test meaningless. This Court made the same point again in *Gilmore v. Taylor*, 508 U.S. 334, 344-345 (1993). In that case this Court rejected the idea that the right to present a defense dictated a rule that a state could not give jury instructions that prevented the jury from considering an affirmative defense presented at trial. *Id.* This Court again held that at this level of generality *Teague* analysis would provide no meaningful guidance as to what a new rule is. *Id.*

The court below found a rule that has apparently never been previously discovered or enforced by a majority of any appellate court in the history of the Republic to be dictated by existing precedent. In so doing the court engaged in a type of analysis repeatedly rejected by this Court, and presumably avoided by lower courts that follow this Court's precedents. The court below also created its own definition of a "new" rule of law that on its face contradicts the definition set out by this Court. These holdings promise future unnecessary conflicts between the court below and other circuit courts of appeals.

3. **The discovery by the court below of a purported watershed rule of criminal procedure necessary to fundamental standards of fairness and accuracy in criminal law presents a significant issue. This creates the potential for further conflicts with other circuit courts of appeals should the court below discover other watershed**

rules of criminal procedure based on similar reasoning.

This Court has recognized that certain watershed rules of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding may be retroactively applied in a habeas corpus case. *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This Court has indicated that the right to counsel in serious criminal proceedings is such a rule. *Id.* This Court has also noted that to be a watershed rule of this type the rule must fall into the small core of rules requiring the observance of procedures that are implicit in the concept of ordered liberty. *Gilmore v. Taylor*, 508 U.S. 333, 346 (1993). Additionally, such a new rule must involve a new procedure without which the likelihood of an accurate conviction is seriously diminished. *Butler v. McKellar*, 494 U.S. 407, 417 (1990). This Court found in *Teague* that it is unlikely that many such basic components of due process have yet to emerge. *Teague v. Lane*, 489 U.S. 288, 314 (1989) (plurality opinion).

The rule created by the court below is not implicit in the concept of ordered liberty and it does not enhance the likely accuracy of Smith's conviction. That the prosecutor presented a contradictory theory at Cunningham's trial has nothing to do with the accuracy of Smith's trial. There is no finding that the theory presented at Smith's trial was false or that the prosecutor did not himself believe the theory he presented in Smith's case. The record supports the conclusion that he did.

The court below's recognition of a "watershed rule", that does not have the qualities this Court has held to be necessary to a watershed rule, has created a conflict with the Fifth Circuit in the case of the specific rule found by the court below. The reasoning behind the recognition of this "watershed rule" also creates the potential for future

unnecessary conflicts with other circuit courts of appeals that have followed this Court's jurisprudence on the nature of a watershed rule of criminal procedure.

Conclusion

Superintendent Gammon and Attorney General Nixon pray that this Court issue a writ of certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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